SERVED: November 10, 2003

NTSB Order No. EA-5063

UNITED STATES OF AMERICA
**NATIONAL TRANSPORTATION SAFETY BOARD**
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of November, 2003

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| APPLICATION OF<br><br>DALE L. WHITTINGTON<br><br>For an award of attorney fees and related expenses under the Equal Access to Justice Act | Docket 301-EAJA-SE-16595 |

**OPINION AND ORDER**

Applicant has appealed from the Equal Access to Justice Act (EAJA) initial decision of Administrative Law Judge William A. Pope, II, rendered on November 21, 2002.[1] The law judge denied the application. We are reversing the law judge's decision and granting the EAJA application in part.

In the underlying emergency revocation proceeding, the Board

[1] The initial decision is attached. Applicant moved to strike the Administrator's late reply brief. We deny the motion, as no harm will result from accepting the late reply. FAA counsel is cautioned, however, that it is his duty to ensure that briefs are actually served when and on whom they are supposed to be served, and that this is not a duty that can be delegated to unnamed office staff.

found that applicant had not been shown to have violated Title 14 C.F.R. sections 61.16(b) and 91.17(c)(1) of the Federal Aviation Regulations ("FARS"), which, in a nutshell, require a person to submit to a test for alcohol when requested to do so by a law enforcement officer with authority to make the request. In so finding, we overturned the finding of the law judge that applicant had violated these provisions.

The Administrator's allegations against this applicant relate to a February 21, 2002 flight in which applicant was the pilot-in-command of a Learjet 25B, N128TJ, landing at Fort Lauderdale-Hollywood International Airport after a flight from San Jose, Costa Rica. The co-pilot on this flight was Johannes Mostert, and there were no passengers. The U.S. Customs Service apparently received information that the flight crew might be using narcotics. Broward County Deputy Sheriff Winfield Phillips was called to the airport by Customs agents. A bag belonging to Mostert was recovered as a result of a search of the plane, and a small amount of white powder was found that was suspected to be cocaine.[2] After administering a field sobriety test (which applicant failed), Phillips arrested applicant for operating an aircraft while intoxicated, and transported applicant to a Broward County testing center. Applicant agreed to submit to an "Intoxilyzer" breath test, which resulted in a triple zero

[2] Mostert was arrested for possession of a controlled substance, but neither Mostert nor applicant has been prosecuted by Florida authorities for any actions in connection with this incident.

reading, showing the absence of alcohol in the blood. Applicant did not submit to a subsequent urine or blood test requested by Officer Phillips.

The Administrator brought an emergency revocation proceeding charging applicant with violations of section 91.17(a)(3), prohibiting an airman from acting as a crew member while using any drug that affects his or her faculties in any way contrary to safety. She also charged a violation of section 91.19(a), prohibiting operation of an aircraft with knowledge that illegal narcotics are aboard. Finally, she charged that applicant violated sections 61.16(b) and 91.17(c)(1) relating to failure to take a test for alcohol. On June 17, 2002, immediately before the hearing was to begin, the Administrator dropped the first two charges, leaving only the charges relating to alcohol testing.[3]

On the remaining two charges, the law judge found that, even after applicant had submitted to a breath test resulting in a triple zero reading, the matter of the cause of his observed impairment was still in doubt, and that a further blood or urine test for alcohol could still have proved positive. In our July 16, 2002 decision reversing the law judge, we found that applicant submitted "to a test to indicate the percentage by weight of alcohol in the blood" as required by the FARS when he

[3] Although prior to this EAJA application the Administrator had given no reason for dropping these two charges, she now indicates that Broward County had failed to complete the test of the substance found in Mostert's bag, and that one witness was unavailable for the hearing.

submitted to the Intoxilyzer test. When he was asked to take further blood or urine tests, those tests were clearly sought by the Broward County officer to investigate his suspicion of impairment by illegal drugs, not alcohol. See discussion *infra*.

Applicant submitted an EAJA application, claiming that he prevailed against the Administrator on all charges, that the case against him was not substantially justified in fact or law, and that he should be awarded attorney fees and expenses. The Administrator opposed the EAJA application. The law judge denied the EAJA application, finding that the Administrator was substantially justified in claiming violation of the regulations requiring an airman to submit to a test for alcohol.

EAJA requires the government to pay certain attorney fees and expenses of a *prevailing* party unless the government establishes that its position was *substantially justified*. 5 U.S.C. 504(a)(1). To meet the substantial justification standard, the Administrator must show that her decision to bring and maintain her case was "reasonable in both fact and law, [that is,] the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory." Thomas v. Administrator, NTSB Order No. EA-4345 at 7 (1995) (citations omitted). Reasonableness is determined by whether a reasonable person would be satisfied that the Administrator had substantial justification for proceeding with her case, Pierce v. Underwood, 497 U.S. 552, 565 (1988), and is determined on the basis of the

"administrative record as a whole." Alphin v. National Transp. Safety Bd., 839 F.2d 817 (D.C. Cir. 1988). The Administrator's failure to prevail on the merits in the original proceeding is not dispositive. U.S. Jet, Inc. v. Administrator, NTSB Order No. EA-3817 (1993); Federal Election Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986).

As a threshold matter, the Administrator claims that applicant did not prevail on the first two charges relating to possession and transport of illegal drugs because those charges were withdrawn before the hearing. To the contrary, applicant did prevail within the meaning of EAJA because "the final result represents in a real sense a disposition that furthers [applicant's] interest." National Coalition Against Abuse of Pesticides v. EPA, 828 F.3d 42, 44 (D.C. Cir. 1987). Thus, applicant prevailed on all four counts – two being withdrawn by the Administrator and two being dismissed by the Board. The remaining question is whether it was reasonable for the Administrator to bring the narcotics charges in the first place and whether it was reasonable to bring and pursue the alcohol testing charges.

As to the withdrawn narcotics charges, we are told that Broward County was unable to complete a test for cocaine in the several months that succeeded this incident and that one witness (unidentified) was unavailable for the hearing. We are not told what efforts the Administrator may have undertaken to obtain a test result, nor are we told which witness was unavailable, and

what he or she might have added to these proceedings. Normally, we are likely to find that this is not a sufficient explanation to support a finding of substantial justification. However, the suspicion of illegal drug and/or alcohol use is a special factor that must be heavily weighed in the Administrator's favor. Thus, despite the thin explanation for the Administrator's sudden change of course, we believe that in this case there was an adequate evidentiary and legal basis for the Administrator to proceed under the assumption that applicant was in fact impaired, and that a likely cause of his impairment was illegal drugs that were on the aircraft.

As we emphasized in our decision on the merits, these are serious charges that should be pursued where warranted to protect the public safety. The substantial facts supporting the position that applicant appeared to be impaired were thoroughly set forth in the law judge's November 21, 2002 EAJA decision at 5-7 and were reasonably acted on by the FAA.

As to the alcohol charges that were the subject of the hearing, our conclusion is different. Both § 61.16(b) and § 91.17(c)(1) clearly relate only to a failure to take a test indicating the presence of alcohol in the airman's system. For whatever reason, it does not extend to failure to submit to a test for drugs. As we emphasized in our prior decision, the only real question here is whether applicant refused to take a test that was sought by the law enforcement officer for determining whether there was alcohol in his system. Under a plain reading

of the regulations, he did not fail to take such a test. He submitted to the Intoxilyzer test.

The Administrator claims that the testimony of the witnesses has been misrepresented by applicant, and that it clearly supports the inference that the follow-up blood and urine tests were sought for the purpose of determining whether applicant was impaired by alcohol, and that the "blood test was (to be) used to verify the result of the breath test." Similarly, the law judge found that the breath test was "inconclusive" and that the testimony of the witnesses was ambiguous as to whether the further blood and urine tests were sought to establish alcohol impairment.

These positions are not reasonably supported by the evidence. The crucial witness here was Deputy Sheriff Phillips, who was the arresting officer and the only witness with authority to request the blood and urine tests. Phillips clearly indicated that after applicant tested negative on the breath test, he no longer was suspicious of, or looking for, alcohol in applicant's system. Phillips testified unambiguously that "If he blew triple zeroes he wouldn't be under the influence of alcohol." Tr. at 232. When asked what he did suspect was the cause of applicant's observed impairment, Phillips said "drugs." Tr. at 220.

The testimony of witness Susan Jones, the Broward County Breath Technician, corroborates Phillips' testimony. She testified that the Intoxylizer test showed no alcohol in applicant's system (Tr. 241), and that thereafter they were

looking for drugs (Tr. 250). Accordingly, we cannot find as a matter of fact that a blood or urine test for alcohol was requested by a law enforcement officer. As a result, the Administrator's case does not have a reasonable basis in fact.[4]

Having found that the Administrator was not substantially justified in bringing or pursuing the § 61.16 and § 91.17 charges related to alcohol testing, but was substantially justified in her initial pursuit of the drug charges, we must calculate an EAJA award. Although it is impossible for us to determine precisely how much expense applicant incurred in preparing to defend against the withdrawn drug charges and his application offers no help in this regard, we believe that it is appropriate for us to disallow two-thirds of the fees that were incurred up until the time of the hearing before the law judge. There were three basic charges: possession of an illegal drug, transport of an illegal drug, and failure to take an alcohol test. The first two were dismissed, but we have found, *infra*, that the Administrator was substantially justified in pursuing them as far as she did. Thus, those fees may not be recovered. Accordingly, we have estimated the authorized pre-hearing fees at one-third of the submitted amount (that is, $4,698.34 allowed). We have allowed all the prehearing expenses, as they are not excessive.

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[4] Although we need not decide the point, we also question whether the case had a reasonable basis in law, in that the regulations speak to "a test," not more than one test. Applicant submitted to "a test." We encourage the Administrator to review the phrasing of this rule and ensure it meets her enforcement and

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All other hearing and post-hearing expenses and fees are authorized to be recovered.[5]

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Applicant's motion to strike the Administrator's reply is denied;

2. The Administrator's motion to dismiss is denied and her reply is rejected; and

3. Applicant's appeal of the law judge's EAJA decision is granted in part, to the extent that applicant is awarded EAJA fees and expenses of $25,154.25, conditioned on the requirement that applicant's estate request to be substituted for the applicant in this EAJA proceeding.

ENGLEMAN, Chairman, ROSENKER, Vice Chairman, and GOGLIA, CARMODY, and HEALING, Members of the Board, concurred in the above opinion and order.

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safety goals.

[5] The Administrator has filed a one-sentence motion to dismiss, containing no citation to authority, on the grounds that applicant is deceased. Applicant's counsel has answered, and the Administrator has filed a reply to that answer. The reply will be rejected as not authorized (no leave to file was sought), and the motion to dismiss will be denied. The Administrator offers no good reason why an applicant's estate should not be the beneficiary of an EAJA award. Although this is the first time the issue is squarely before us (see Administrator v. Blair, NTSB Order No. EA-4253 (1994)), we believe the purposes of EAJA would be thwarted if the government could escape liability due to an applicant's demise. The Administrator has offered no evidence that applicant's estate is not liable to counsel for the cost of representation. EAJA requires that recovery go to the applicant, not to counsel. To ensure this condition is met, we will require that the personal representative of applicant's estate appear and seek substitution in this case.